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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

No. 445

TAGE E. PEARSON,

Petitioner,

vs.

YOUNGSTOWN SHEET AND TUBE COMPANY,
an Ohio corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petitioner, Tage E. Pearson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on June 4, 1964. No rehearing was requested.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as:

Tage E. Pearson v. *Youngstown Sheet and Tube Company, an Ohio corporation,* (C.A. 7, 1964) 332 F. 2nd 439.

A copy of the opinion and order is appended to this petition in the Appendix at Page 9a.

The opinion and order of the United States District Court for the Northern District of Indiana on the Respondent's Motion to Dismiss Counts I and III of the Petitioner's Amended Complaint, is appended to this petition in the Appendix at Page 1a.

The order of the said District Court granting the Respondent's Motion for Summary Judgment on Count II of the Petitioner's Amended Complaint and judgment on Counts I, II and III is appended to this petition in the Appendix at Page 1a.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on June 4, 1964 (Appendix 15a). No petition for rehearing was filed.

The statutory provision believed to confer jurisdiction to review the judgment in question is Title 28 U.S.C.A. Section 1254 (1), and reads:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTIONS PRESENTED FOR REVIEW.

I. Where an employer enters into a contract with a non-union employee for permanent employment, and the employee, in reliance on and as consideration for this contract forbears termination of his employment, and further becomes unemployable elsewhere by reason of his continued employment, then can the court say that the consideration bargained for cannot, as a matter of law, be sufficient to support the contract?

II. Did the District Court err in ruling that a person acting as an agent and within the scope of his employment cannot conspire with his principal to tortiously interfere with a contract to which the principal is a party?

III. Where a non-union employee with 28½ years of service was seriously injured in the course of his employment, and the company doctor, as an agent for the employer, negligently examines him and orders him to return to work; and where the employee's immediate supervisor, knowing the employee was confined to the Mayo Clinic for an operation, orders him to return to work during such confinement; and where a co-employee misrepresents to the employer that the employee has quit; then can the employer, under the doctrine of respondeat superior; be held liable for these negligent and wilful acts which result in the termination of the employee's employment in the absence of a contract of employment?

CONSTITUTIONAL PROVISIONS, RULES, ETC., INVOLVED.

No federal or state constitutional or statutory issues are involved in this petition.

CONCISE STATEMENT OF THE CASE.

Federal Jurisdiction

Federal jurisdiction was obtained in the District Court by reason of diversity of citizenship and the amount in controversy, exclusive of interest and costs, exceeding Ten Thousand Dollars.

Procedural History

This action was instituted by filing an Amended Complaint in three counts in the District Court for the Northern District of Indiana, Hammond Division. The defendant filed a Motion to Dismiss which was granted as to Counts I and III. Thereafter, Interrogatories were filed and answered by both parties and the defendant filed a Motion for Summary Judgment on Count II and supporting affidavits. This motion was granted and judgment entered for the defendant, whereupon the plaintiff appealed to the Court of Appeals for the Seventh Circuit. Judgment for the defendant was affirmed.

Summary of Facts

The defendant is engaged in the business of producing steel and steel products in the City of East Chicago, Indiana. The plaintiff, Petitioner here, was employed by the defendant continuously since 1933 under a contract of permanent employment. On February 7, 1961 he was injured in the course of his employment and negligently examined by a doctor acting as the agent for the defendant, who pronounced him fit to return to work. The plaintiff's supervisor ordered the plaintiff to return to work on a day certain, knowing that on the date the plaintiff was confined to the Mayo Clinic at Rochester, Minnesota. Further, another employee of the

defendant falsely represented that the plaintiff had voluntarily terminated his employment. As a result of these acts the plaintiff was without a job.

On the basis of these facts the plaintiff filed an Amended Complaint in three counts. Count I alleged that the defendant wrongfully discharged the plaintiff, thereby breaking the contract of employment. Count II charges that the defendant, through its agents, tortiously conspired with another, to-wit; the doctor, to interfere with the plaintiff's contract of employment. And lastly, Count III is an action for damages against the defendant arising out of the negligence (malpractice) of the doctor, the wilful act of the supervisor and the intentional misrepresentation of a co-employee, all of which resulted in the plaintiff being deprived of his employment. Counts I and II proceed on the theory of breach of contract and Count III in negligence in the absence of a contract.

REASONS FOR ALLOWANCE OF WRIT.

Your Petitioner would respectfully show this Court that this petition should be granted and the Writ allowed for the reasons that the decision and opinion of the Court of Appeals

1. Denies to an employee not protected by a collective bargaining agreement, his only basis to secure from his employer an independent contract for protected permanent employment thereby denying him his right to contract for his services.
2. In denying an employee the right to enforce a contract freely entered into, leaves him without the protection of the contract and involuntarily subjects him to the whims and caprices of his employer in violation of the agreement.
3. Subjects a non-union employee to abuses following from the negligent, intentional and malicious acts of co-employees which result in depriving him of his employment without providing compensation therefor.
4. Violates a procedural rule approved by this Court in that, on a Motion to Dismiss, it did not accept as true the material allegations of fact as set forth in the plaintiff's complaint.

Your Petitioner would further urge this Court to allow said Writ for the reason that the issues here presented have not been passed upon by the highest court of Indiana or of any other state and are of national importance in the field of labor relations governing employees not protected by union agreements. This Honorable Court should recognize its duty to pronounce the law for Indiana and properly guide other states in establishing the right and responsibilities arising in non-union employer-employee relationships.

ARGUMENT.

I.

The primary issue here presented in Count I of the petitioners complaint is not the existence or non-existence of a contract of employment or the term thereof, but rather it is confined to whether the court is correct in holding that the consideration given to support this contract cannot be, as a matter of law, sufficient to support the agreement. The complaint alleges the existence of the agreemnt and that its term was permanent. Under a ruling by this court the Court of Appeals was bound to accept these allegations as fact. *Clark* v. *Uebersee Finanz-Korporation A. G.* (1947) 68 S. Ct. 174, 332 U.S. 480. Instead the Court chose to ignore these facts and said, "Admittedly there was no written contract, so in the beginning the parties must have entered into an oral contract of *indefinite duration* by which plaintiff agreed to render service to defendant for a specified consideration. This relation insofar as it concerned plaintiff's tenure of employment remained from *year to year*. Either party had the legal right at any time to sever the relationship." Your petitioner submits that this construction is a flagrant violation of the rule announced in the *Clark* case.

The agreement under consideration is unilateral in nature. The law in Indiana is that "A promise offered in exchange for specified action or forbearance becomes binding and irrevocable as soon as part of the requested performance has been actually rendered or a proper tender of performance has been made, provided that performance was induced by the offer." 6 I.L.E. 80, Contracts §23, citing *Schmidt* v. *Weil*, 46 Ind. App. 264, 92 N.E. 353 (1910). Also see Corbin on Contracts (1952) §63 at page 102, Restatement of Contracts, §45.

Assuming as we must that the offer or promise of permanent employment was extended, the question then becomes whether the consideration was insufficient as a matter of law to make the offer irrevocable. We believe the consideration flowing from the petitioner in this case to his employer took two separate and distinct forms.

The petitioner had the right to voluntarily terminate his employment at any time and to seek a better or more definite agreement as to the duration of new employment, but did instead forbear from exercising this right also in reliance on the alleged agreement.

The sufficiency of forbearance in the exercising of this right has been repeatedly recognized as consideration to support an agreement over and above fulfilling the daily obligations.

In the case of *H. S. Kerbaugh, Inc.* v. *Gray* (2nd Cir., 1914) 212 F. 716, the plaintiff was in the employ of the defendant as its general superintendent. Work was progressing slowly and the foremen were dissatisfied. The plaintiff called this to the attention of the defendant who authorized him to promise a bonus to three of the foremen. It was contended by the plaintiff that at the same time the defendant also promised to give him a bonus. (There is no showing that the plaintiff was dissatisfied or interested in terminating his employment.)

The plaintiff instituted this suit to recover the alleged bonus and a verdict was returned for the plaintiff. The defendant appealed. The Court said:

> "The objection mainly relied upon at the trial and here was that this promise of a bonus, if made, was nudum pactum because the plaintiff, being bound to do his best for his salary, gave nothing in the way of consideration to support the promise of a bonus. This

would be true if the plaintiff were legally bound to continue in the employment of the defendant to the end of the season. But he was not and could have quit work at any time. *Martin* v. *New York Life Ins. Co.* (1895) 148 N.Y. 117, 42 N.E. 416. Therefore the jury had a right to find that he continued in the employment after this promise of a bonus, relying upon it." (Reversal on other grounds).

Knapp v. Imperial Oil and Gas Products Co. (4th Cir., 1942) 130 F. 2d 1, is a similar case. There W. A. Knapp, the plaintiff, had been employed for many years and for the last twenty of these years was the defendant's superintendent. During the course of his employment he was offered a bonus of 1½c per pound on all Kohinoor produced. This suit was instituted to collect this bonus. The lower court, hearing the evidence without the intervention of a jury, found:

> "* * * that the plaintiff's regular duties for which he was hired and paid his regular compensation, included experiments to produce new and better blacks, and to improve the quality of all blacks and the production of them as economically as possible."

Judgment was entered for the defendant and the plaintiff appealed.

The Circuit Court of Appeals in reversing and remanding said:

> "Nor is there any substance in the argument that the bonus contract was devoid of consideration and therefore invalid under West Virginia law, because the plaintiff was employed and paid to perform the services rendered in the form of a fixed monthly salary. The evidence shows that the plaintiff was offered the bonus in addition to his regular salary, in consideration of a continuation of his efforts in the company's behalf, and since he remained with the company and rendered the services, he is entitled to recover accordingly."

It should be pointed out that in this case there was no evidence that the plaintiff either threatened or contemplated leaving his employer. The bonus was merely a further inducement for him to continue in the performance of his duties and to forbear his right to voluntarily leave.

Also see *Zampatella* v. *Thomson-Crooker Shoe Co.* (3 Cases), (1924) 249 Mass. 37, 144 N.E. 82, where it was held that continuation of employment was sufficient to support a promise to pay a bonus.

The position of the plaintiff is not at all unlike those of the plaintiffs in the "bonus" cases. Employment is begun under certain conditions for certain wages. These wages and conditions are re-negotiated from time to time to improve the lot of the employee. A pension plan is produced to provide the aging worker with a few well-earned years of rest. These are also bonuses, the primary purpose of which is to induce those workers who are competent and capable of properly performing their duties to remain at their post.

Devices such as the foregoing are not used only to "buy" loyalty and devotion, but also to induce the employee to forbear his right to seek employment elsewhere, thereby providing increased efficiency and to reduce or eliminate employee turnover with its attendant expenses.

If such forbearance will serve as sufficient consideration to support a contract to pay a bonus, why then can it not be sufficient to support a contract for permanent employment?

The right to enter into such contracts has long been recognized in Indiana where supported by sufficient consideration. In the case of *Pennsylvania Co.* v. *Dolan* (1892) 6 Ind. App. 109, 32 N.E. 802, the plaintiff released his employer from all liability arising out of certain injuries

and in return the employer agreed to give him steady and permanent employment. It was there urged by the defendant that the agreement was void for want of mutuality since the employee could terminate the agreement at will. The court said:

> "Here the appellee (plaintiff) has relinquished a claim against the appellant that had a certain value. He has placed it beyond his power to recover a corresponding benefit. The appellant, recognizing his obligation in the premises, gives the appellee employment for a short time, and then, without the latter's fault, and without any just cause leaves him in his crippled condition to buffet the world as best he can. This is, in our estimation, a flagrant breach of contract, and courts exist to a poor purpose if they can give no redress for such a wrong."

A landmark decision in a situation similar to the one at hand is the case of *Carnig* v. *Carr* (1897) 167 Mass. 544, 46 N.E. 117. Here the plaintiff was induced to give up a business to work for the defendant at stipulated wages under an oral agreement for permanent employment. Several months later the defendant suspended the plaintiff and finally terminated his employment altogether, although he had work of the kind which the plaintiff was to do. The defendant contended the agreement was void for want of consideration. The court said:

> "To ascertain what the parties intended by 'permanent employment', it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would commonly be understood; for it fairly may be assumed that the parties used and understood them in that sense. * * * Looking at the matter in that way, we think that the words would be commonly understood as meaning that so long as the defendant was engaged

in enameling, and had work which the plaintiff could do, and desired to do, and so long as the plaintiff was able to do his work satisfactorily, the defendant would employ him, and in that sense the employment would be permanent; that is, the plaintiff would be under no necessity of looking for work elsewhere, but could rely on the arrangement thus made. So construed, the contract would be capable of enforcement, and there would be no want of mutuality because the plaintiff might not have bound himself to continue in the defendant's employment. The construction contended for by the defendant, namely, that it was for him to say whether he needed the plaintiff's services or not, would put the plaintiff entirely at the defendant's mercy, and, in view of the fact that the plaintiff was to give up his business to enter the defendant's employment, would be such an agreement as he could not reasonably have been expected to make. * * * On the other hand, it would be equally unreasonable to hold that the defendant could have intended to bind himself to employ the plaintiff so long as they both lived, regardless of his continuing in the enameling business, or the plaintiff's rendering satisfactory service. The plaintiff does not, indeed, contend for such a construction."

We fail to see any serious difference in surrendering an existing position, and continuing in a present positon rather than going into a labor market for new employment when you are able to do so. *Query*: Would the court in the *Carnig* Case have held the consideration insufficient if the defendant could have proven that the plaintiff's business was being operated inefficiently and would have gone out of business in a short time? *Query*: Would the court's holding have been different if the plaintiff had been employed by the defendant and turned down a better offer from the plaintiff's competitor in return for a guarantee of permanent employment?

We submit the question is not whether the plaintiff left a particular business, but rather did he pursue his employer's business to the exclusion of all others in reliance on the promised performance of an agreement!

With regard to the *H. S. Kerbaugh* and *Carnig* cases the Court of Appeals comments that they are of no benefit to the petitioner and summarily dismisses them. Yet the precise issue on which those cases were decided is present here.

As additional consideration the complaint alleged that the petitioner continued in his employment for 28½ years in reliance on the defendant's continued compliance with the contract of employment and by reason of the passage of such period of time, the petitioners suitability for employment elsewhere has been destroyed. Or to put it in other words, because he acted on the defendant's inducement he is now undesirable elsewhere for employment. It is unfortunate but it is a fact of life that senior citizens are not sought after when younger and more vigorous men, with a longer working life before them, are available.

We have been unable to find where this issue has ever been decided by a court of law, but logic would compel and justice would require the conclusion that when an employee had been stripped bare of his ability to earn a livelihood in reliance on a promise of an employer, that the employer ought not then be heard to say that the employee gave nothing but a day's work for a day's pay. Problems will be presented by this conclusion but they are not without solution.

The primary question raised by recognition of this detriment serving as consideration is when does the consideration arise. Does it arise after one year or thirty years? The an-

swer does not lie in a mathematical equation but rather in guiding principle or test in the light of which each factual situation can be reviewed. We believe we have found this principle. The consideration urged here should be found to exist:

IF (1) the employee has pursued the business of his employer to the exclusion of all others and,

(2) is unemployable elsewhere in the existing labor market,

(3) for the same or similar job,

(4) merely by reason of his tenure with the employer,

THEN such consideration should continue to exist, and support the contract to the extent that

(1) the employer may not discharge the employee wrongfully or without good cause,

(2) so long as his services remain necessary.

The rule we seek to urge upon the court in support of Count I of the petitioner's Amended Complaint DOES NOT attempt to handcuff the employer in the operation of its business. It DOES seek to impose upon it the duty to be responsible, rather than arbitrary, to be fair in its dealings rather than unjust, and to act with deliberation rather than indiscriminately where it has induced an employee to surrender his means of earning a livelihood.

II.

Count II of the Petitioner's Amended Complaint alleges an action for conspiracy to tortiously interfere with the petitioner's contract of employment. On a Motion for Summary Judgment the District Court found that all of the

alleged co-conspirators were employees of the defendant and that the action could therefor not be maintained. The Court of Appeals reached the same conclusion but added "As we have already shown, the instant contract was terminable at will. Thus, the alleged conspiracy was to do that which the defendant had a legal right to do. Certainly it was not to accomplish a criminal or unlawful purpose or to accomplish such purpose by criminal or unlawful means."

Thus we have two issues for consideration: (1) can agents of a corporation acting as such be guilty of conspiracy, and (2) is a conspiracy to interfere with a contract terminable at will actionable?

> "A conspiracy is defined to be a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Karges Furniture Co.* v. *Amalgamated Woodworkers' Local Union No.* 131 *Et al* (1905) 165 Ind. 421, 75 N.E. 877, at 878.

The rule concerning actionable interference with a contract of employment is set forth in *Wade* v. *Culp* (1939) 107 Ind. App. 503, 23 N.E. 2nd 615, at 618, as follows:

> "This rule is again announced in the case of *Campbell* v. *Gates*, 236 N.Y. 457, 141 N.E. 914, 915, in the following language: 'The great weight of authority in this country and in England is to the effect that, if A. has a legal contract with B., either for the rendition of service or any other purpose, and C., having knowledge of the existence thereof, intentionally and knowingly, and without reasonable justification or excuse, induces B. to break the contract, by reason of which A. sustains damage, an action will lie by A. against C. to recover the same. * * * The action of C. is malicious, in that, with the knowledge of A.'s rights, he intentionally and knowingly and for unworthy or selfish purposes, destroys them by inducing B. to break his contract. It is a wrong-

ful act, done intentionally, without just cause or excuse, and from this a malicious motive is to be inferred. This does not necessarily mean actual malice or ill will, but the intentional doing of a wrongful act without legal or social justification. The action is predicated, not on the intent to injure, but on the intentional interference, without justification, with A.'s contractual rights, with knowledge thereof. It is a legal wrong, and one who commits it, if damage be sustained, must answer therefor.'"

Here an agent, a company doctor, conspired with the defendant, acting through other agents as a corporation must. There can be no question but that agents acting tortiously in concert may well act for the principal and the principal will be liable under the doctrine of respondent superior. So if several agents, acting for different principals committed the acts alleged the principals would be responsible. This is true even though the action was for interference with a contract to which one of the principals was a party. Applying Indiana law the Seventh Circuit has expressly held that a party to a contract can be held liable in tort for conspiring with another to breach that contract. *Sinclair Refining Company* v. *Atkinson* (1961, 7th Cir.) 290 F. 2nd 312.

It is so well settled that an agent, even while acting wholly within his authority, is individually liable for his torts that it needs no citation of authorities. We here then have a situation where your petitioner could file suit against the individual co conspirators but once their employer is joined, the entire action fails. This does not make sense!

As to the second point we do not concede that the employment was terminable at will but assuming that it was the action still need not fail. This Court has held that the "reasonable probabilities" under such contract is such a right as can be interferred with.

In the case of *Hitchman Coal & Coke Co. v. Mitchell*, (1917) 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260, this court said:

> "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employes, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was "at will," and terminable by either party at any time, is of no consequence. In *Truax v. Raich*, 239 U.S. 33, 38, 36 Sup. Ct. 7, 9 (60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917 B, 283), this court ruled upon the precise question as follows:
>
> > 'It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will' (citing many cases).
>
> In short, plaintiff was and is entitled to the good will of its employes, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employes, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalcul-

ably great, and is recognized by the law in a variety of relations." (citing authorities).

III.

With respect to Count III of the petitioner's Amended Complaint, the Court of Appeals said:

> "Count III is based upon an alleged negligent examination and report as to plaintiff's physical condition which resulted in his discharge by defendant. Plaintiff invokes the theory of respondeat superior in support of his contention that defendant was liable for the alleged negligence of its doctor. It is true that under this doctrine the liability of an agent may be imputed to his principal; however, the question of liability and breach of duty must first be resolved. As we have already shown, defendant was free to terminate plaintiff's employment at will and owed no duty to plaintiff with regard to its continuation. *Its agent, acting on its behalf, owed no greater duty to plaintiff and hence breached no duty in that respect.* In any event, defendant in discharging plaintiff did nothing more than it had a right to do under the terms and conditions of his employment." (Emphasis ours)

Count III also charges that two employees of the defendant, co-employees of the plaintiff, deliberately and wilfully made certain representations which also resulted in the plaintiff being deprived of his employment. This negligence is also sought to be imputed to the defendant.

If either or all of the foregoing acts are imputed to the defendant, the question then becomes: Are they actionable in view of the fact that the plaintiff's employment was terminable at will? If these acts were done by a stranger to the plaintiff's employer, could he assert that no action would lie because the employer could have let him go at will. If a person lost his employment at a bank

because of a false charge of embezzlement by an individual, would the wrongdoer be entitled to urge, in reduction of damages, that his employment was terminable at will and therefore lost wages could not be considered an element of damages? Certainly not!

In determining whether such negligence is actionable we must look at all the facts, and then decide in view of those facts, whether the plaintiff's employment could reasonably be expected to continue for a period into the future but for the negligent and wilful acts.

The *real* issues in this count, assuming no contract of permanent employment existed, are what duty does an employer owe an employee and what duties and responsibilities arise between co-employees by reason of their relationship. It is here where we find the law sorely wanting.

In the opinion of the Court of Appeals Judge Major says:

> "Plaintiff in support of his right to recover advances a novel theory, unknown to the law so far as we are aware. In the concluding paragraph of his brief, he states, 'This is not an action under a written contract where the rights of the parties are carefully defined and duties expressly set forth. * * * It arises by reason of certain facts, some of which are set forth in the complaint. At issue here are the rights and responsibilities arising under those facts. There is very little established law which directly treats of this relationship.' Thus it appears we are requested to promulgate a new rule of law relative to the employer-employee relationship."

The *Hitchman Coal & Coke Company* case, cited previously, begins to make inroads into the void with the use of the words "reasonable probabilities." It recog-

nizes that all of men's relationships are not reduced to formal contracts and that all of men's rights are not confined to their physical well being. The legislative bodies have to some extent attempted to resolve these problems with the National Labor Relations Act and the Fair Employment Practices Act of the various states.

We believe that the field of tort law should be extended to provide further protection of the economic man. Should a person have the right to negligently, wilfully or intentionally act so as to cause another to lose his job. Should a working man have the right to be secure in his economic person or rather be subjected to tortious acts without redress. The Court of Appeals would ignore the wrongs for the reason that he could have been dismissed any way. The fact of the matter is that he would not have been dismissed *but for* the wrongful act.

There can be no question but that the doctor in making his examination owed the petitioner the duty to use reasonable care in doing so. This duty was breached. By reason of this breach the petitioner was damaged. If the suit were against the doctor alone could he defend on the basis that the employment was terminated at will. The Court of Appeals *expressly* says he could.

It is important to note that we are not here saying an employer cannot hire and fire at will when there is no contract. What we are saying is where a wrongful act is committed and the employee is discharged because of it, and the "reasonable probability" is that but for the act, the employment would have continued, then the wrong is actionable.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT'S ORDER DATED APRIL 23, 1963 GRANTING DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT AS TO COUNTS I AND III AND DENYING AS TO COUNT II WITH MEMORANDUM THEREON.

Defendant's Motion to Dismiss the amended complaint in three counts is Granted as to Counts I and III, and Denied as to Count II.

/s/ George S. Beamer
Judge

Enter: April 23, 1963

MEMORANDUM

This cause comes before the Court on Defendant's Motion to Dismiss the Amended Complaint of Plaintiff filed on February 11, 1963.

Previously, the Court granted a Motion to Dismiss all three counts of the original complaint. (See Order of January 31, 1963.)

Plaintiff alleges in Count I of the amended complaint that Defendant breached an implied contract for permanent employment.

Count II of the amended complaint alleges that Defendant owed to Plaintiff the duty to refrain from terminating his employment without just cause, but that Defendant did negligently, carelessly, wilfully and tortiously, in conspiracy with another, interfere with the aforesaid contractual relationship.

Count III of the amended complaint alleges that agents of Defendant, while acting within the scope of their em-

ployment, negligently or wilfully and intentionally misrepresented that Plaintiff had voluntarily terminated his employment with Defendant, and that Defendant's doctor had negligently examined and advised Plaintiff that he was an able bodied man when said physician should have known that Plaintiff was not.

Defendant's Motion to Dismiss is based on three grounds: (1) Plaintiff is not entitled as a matter of right to file his amended complaint; (2) Plaintiff's motion for leave to file amended complaint is not timely under Rule 59(e) or 60(b); (3) Alternately, Plaintiff's proposed amendment does not remedy the deficiencies in his original complaint or state a claim upon which relief can be granted.

(In a reply brief, Defendant concedes that the motion to file is timely, having come under the wire of the 10 day filing requirement. That leaves (1) and (3) for consideration.)

Since the Court permitted the filing of the amended complaint at hearing last week, the remaining question is the sufficiency of the amended complaint in three counts.

Plaintiff, in Count I, alleges he has continued "his employment with the defendant for 28½ years in reliance on the defendant's continued compliance with the said implied contract of employment and by reason of the passage of such period of time, the plaintiff's suitability for employment elsewhere has been destroyed." (Rhetorical paragraph 6).

(Appendix A)

In the absence of good consideration additional to the services to be rendered, an employment contract is no more than an indefinite general hiring terminable at the will of either party. *Toni* v. *Kingan Co.*, 214 Ind. 611, 15 N.E. 2d 80 (1938); *Mt. Pleasant Coal Co.* v. *Watts*, 91 Ind. App. 501, 151 N.E. 7 (1926); *Pennsylvania Co.* v. *Dolan*, 6 Ind. App. 109, 32 N.E. 802 (1892).

It is apparent from the allegations of Count I that Plaintiff has stated nothing more than an employment contract terminable at will. Plaintiff contends that 28½ years service, and the passage of time having made him unsuitable for employment elsewhere, is a sufficient detriment to serve as additional consideration for a permanent employment contract. However, the rule in Indiana, as elsewhere, necessarily contemplates the passage of time as inherent when services are rendered, such services being consideration for the continuing employment. The additional consideration required by the rule is usually (though not restricted to) a release by the employee of claims for damages for personal injuries. *Toni*, supra.; *Cox* v. *Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 103 N.E. 337 (1913) or by a conveyance or transfer of property from the employee to the employer. *Mt. Pleasant Coal Co.*, supra. (Employee transferred coal lease to employer.)

Since employment at will may be terminated by either party with or without cause, *Montgomery Ward & Co.* v. *Guignet*, 112 Ind. App. 661, 45 N.E. 2d 337 (1943), and no additional consideration beyond services rendered is alleged, Plaintiff has failed to state a claim upon which

relief can be granted in Count I of the amended complaint.

Count III of the amended complaint remains substantially unchanged from Count III of the original complaint. It now alleges that certain of defendant's agents negligently or wilfully and intentionally misrepresented that Plaintiff had voluntarily terminated his employment with Defendant, and that Plaintiff was given negligent medical advice by Defendant's doctor while acting in the scope of his employment.

Since the Defendant is a corporation and acts only by and through its agents and employees within the scope of their employment, Plaintiff is alleging, in effect, that Defendant made negligent or wilful and intentional representations to itself.

The Court agrees with Plaintiff that the sole question before the court with reference to Count III is not whether it "sounds" of tort or "smells" of contract but whether it states a "claim." But, by the same token, the Court can not ignore the fact that a right of action, if based on negligent acts or intentional misrepresentations, must arise out of a breach of duty fixed by law, independent of the will or agreement (i.e., contract) of the parties. *Federal Life Insurance Co.* v. *Maxam*, 70 Ind. App. 266, 117 N.E. 801 (1917). Regardless of disguise, the wilful and wrongful acts alleged by Plaintiff in Count III, though tortious in "sound", do not constitute a breached duty independent of any purported contract of employment. For that reason, Count III must be dismissed as having failed to state a claim. See generally, *Federal Life Insurance Co.*, supra.

(Appendix A)

Count II of the Amended Complaint alleges, in general, that defendant negligently, carelessly, wilfully and tortiously, conspired with another, interfering with Plaintiff's contractual relationship, causing the wrongful termination of Plaintiff's employment. Defendant contends this Count must be dismissed for failure to allege in particular the facts constituting the conspiracy. In support of its position, Defendant cites *Schaefer* v. *Macri*, 196 F. 2d 162 (1952-C.A.9th), and *Black & Yates* v. *Mahogany & Association*, 129 F. 2nd 227, 231-232 (1941-C.A.3rd). The remaining allegations of Count II set out the claim of an implied permanent contract, that Plaintiff had been in Defendant's employ for 28½ years, and that Plaintiff has lost wages and incidental benefits as a result of the purported breach.

Under Indiana pleading, a complaint charging conspiracy must state the facts with particularity and set forth the names of the alleged co-conspirators. *Lohrig* v. *Rochat*, 90 Ind. App. 481, 169 N.E. 77 (1929); *Branaman* v. *Hinkle*, 137 Ind. 496, 137 N.E. 546 (1893). And similarly the federal cases cited by Defendant require a complaint charging conspiracy to be stated with particularity and certainty. However, the *Schaefer* v. *Macri* case, supra, is a one paragraph, per curiam decision, lacking sufficient facts to be of assistance in the present case. *Black & Yates*, supra, presented an alleged claim under the Sherman and Clayton Anti-trust acts, and matters affecting interstate commerce and restraint of trade, because of their intricacy, can not be alleged generally. *Weston Theatres* v. *Warner Bros. Pictures*, 41 F. Supp. 757 (1941-D.C. N.J.). Compare: 2 Moore's Federal Prac-

tice, pp. 1726-1727, with authorities therein on pleading anti-trust matters.

Rule 8 of the Federal Rules of Civil Procedure merely requires the pleader to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. See 2 Moore's Federal Practice, pp. 1726-1727, where it is said:

> Quite naturally, the exact wording and statement of the required elements of a given claim for relief will vary with the complexity and nature of the facts and law involved. But the general test remains constant: does the statement of the claim contain the required elements stated plainly and succinctly, and does it give fair notice to the opposite party? If it does, then dismissal of the claim is improper. If more information is needed by the opposing party, in order to form an answer or reply, it may be gained through a motion for a more definite statement under Rule 12(e); by means of discovery under Rules 26-35; and 45; by moving for summary judgment under Rule 56; * * *

Here, Plaintiff has set forth a short and plain statement that Defendant and "another" conspired to cause a breach of contract, resulting in the wrongful termination of Plaintiff's employment. This allegation is sufficient to presept a claim in tort. *Nikora* v. *Mayer*, 122 F. Supp. 587, 588 (N.H.-1954), dismissed on other grounds (dictum), citing *Wade* v. *Culp*, 107 Ind. App. 503, 23 N.E. 2d 615. See also *U. S. ex rel Marcus* v. *Hess*, 1 F.R.D. 282 (1940-D.C.Pa.) (Motion for more definite statement denied as to names of "others" in civil conspiracy); *Conmar Products Corporation* v. *Tibony*, 2 F.R.D. 169 (D.C. N.Y.-1942) (Motion for more definite statement denied

as to names of co-conspirators in action for breach of agreement, violation of trade secrets and patent infringement.

Defendant contended at hearing that the "other" person allegedly involved in the purported conspiracy is actually an agent and employee of Defendant. Therefore, asserts Defendant, Count II charges Defendant with conspiring with itself to breach the employment contract, which is insufficient to state a claim for relief.

On a motion to dismiss for failure to state a claim, the Court cannot consider matters outside the pleadings to which the motion is directed. *Sears, Roebuck & Co.* v. *Metropolitan Engravers, Ltd.*, 245 F. 2d 67 (1957-C. A. 9th). Consequently, the allegations of Count II state a prima facie claim, and the Motion to Dismiss Count II must be denied.

APPENDIX B

DISTRICT COURT'S ORDER OF OCTOBER 22, 1963 GRANTING MOTION FOR SUMMARY JUDGMENT AND ENTERING JUDGMENT ON COUNTS I, II AND III.

Defendant has filed a Motion for Summary Judgment on Count II: Counts I and III were previously dismissed upon the granting of a Motion to Dismiss filed by Defendant.

An examination of the pleadings, answers to interrogatories, affidavits and brief on file show that there is no genuine issue as to any material fact and that Defendant is entitled to judgment on Count II as a matter of law. (Rule 6(b)).

Motion Granted.

Judgment is entered on Counts I, II, and III for Defendant, and this case is hereby Dismissed.

It Is So Ordered.

/s/ George N. Beamer
Judge

Enter: October 22, 1963.

APPENDIX C

COURT OF APPEALS OPINION.

Before Hastings, Chief Judge, Castle and Major, Circuit Judges.

Major, Circuit Judge. Plaintiff filed this diversity action to recover from defendant (a corporation) for an alleged breach of an implied contract of employment. The complaint consists of three counts. The trial court dismissed Counts I and III for failure to state a cause upon which relief could be granted, and allowed defendant's motion for summary judgment as to Count II. From a judgment of dismissal entered October 22, 1963, plaintiff appeals.

Plaintiff in support of his right to recover advances a novel theory, unknown to the law so far as we are aware. In the concluding paragraph of his brief, he states, "This is not an action under a written contract where the rights of the parties are carefully defined and duties expressly set forth. * * * It arises by reason of certain facts, some of which are set forth in the complaint. At issue here are the rights and responsibilities arising under those facts. There is very little established law which directly treats of this relationship." Thus, it appears we are requested to promulgate a new rule of law relative to the employer-employee relationship.

Count I, so far as material, alleges that plaintiff was employed by defendant under an implied contract of employment in which defendant agreed "to permanently employ" plaintiff at wages and salaries and incidental bene-

fits to be agreed upon from time to time; that in consideration for said compensation, plaintiff continued in defendant's employe for 28½ years; that by reason of the passage of said period of time suitability for employment elsewhere had been destroyed, and that defendant breached said implied contract of employment by discharging plaintiff.

Count II in the main repeats the allegations of Count I and in addition alleges "that defendant did negligently, carelessly, wilfully and tortiously, in conspiracy with another, interfere with the aforesaid contractual relationship causing the plaintiff to be dismissed from his employment on or about October 18, 1961."

Plaintiff, in response to interrogatories, admitted that the person with whom defendant allegedly conspired was Dr. J. C. Fleischer, a medical doctor who, pursuant to his terms of employment with defendant, examined plaintiff and reported to defendant his physical condition Plaintiff in his brief concedes that said doctor was an agent of defendant and acting in the scope of his employment in respect to all material times and acts alleged in the complaint.

Count III alleges that defendant's said medical doctor while acting within the scope of his employment carelessly and negligently examined plaintiff and advised defendant that plaintiff was able to return to work when in fact he was not able to do so and, acting upon the misrepresentation of the doctor, defendant directed plaintiff to return to work. The Court further alleges "that an agent of the defendant, unknown to this plaintiff, while acting in the scope of his employment, negligently or

wilfully and intentionally misrepresented to the defendant sometime prior to January 3, 1962, that this plaintiff has voluntarily terminated his employment when he knew or had reason to know that such was not the fact."

Both Counts I and II allege that during all the years of plaintiff's employment there was an implied contract of permanent employment. Admittedly there was no written contract, so in the beginning the parties must have entered into an oral agreement of indefinite duration by which plaintiff agreed to render service to defendant for a specified consideration. This relation insofar as it concerned plaintiff's tenure of employment remained from year to year. Either party had the legal right at any time to sever the relationship.

Plaintiff's position appears to be that because his employment continued for 28½ years, his suitability for employment elsewhere had been destroyed, and that such tenure constituted a sufficient consideration to support a contract of permanent employment. Stated another way, he contends that the detriment incurred by reason of his prolonged employment is sufficient consideration to support the alleged contract. This contention is a tacit admission that there was no such consideration in the beginning but that at some point over the years there emerged a consideration sufficient to support a contract for permanent employment. This theory overlooks the important fact that at any time during those years either of the parties had a right to terminate plaintiff's employment, and that he received all the compensation which defendant promised to pay.

It is fundamental that such an agreement is termin-

able at the will of either party. As stated in *Hoon* v. *Harmer Steel Products and Supply Co.*, 278 F. 2d 427, 433, "* * * it is to be noted that since the agency agreement specified no time duration for the relationship it was an agency at will which could be terminated by either party at any time on due notice to the other party. (Citing cases.)" In C.J.S., Volume 17A, page 491, paragraph 404, many cases are cited in support of the statement, "Where under the contract a party may terminate it at his option, and he does so, the contract is at an end and neither party is liable after termination for further transactions thereunder."

We know of no limitation on this right other than that imposed by statute. The National Labor Relations Act, wherein the right to discharge is limited to non-discriminatory causes, is a notable example. Even so, "that there may be a tenure or term of employment determinable at will is a recognized principle of law." *NLRB* v. *Waterman S. S. Corp.*, 309 U.S. 206, 219.

This being a diversity case, we are reminded that the law of Indiana is controlling. However, we do not find the rule announced by the courts of that State any different from the body of the law generally. The case most emphasized by plaintiff is *Pennsylvania Company* v. *Dolan*, 6 Ind. App. 109, 32 N.E. 802, 804. A statement in that opinion readily distinguishes it from the instant situation. "The Appellee was injured by the Appellant's negligence. The parties * * * agreed to settle * * *; Appellant agreeing to pay the Appellee $100.00 and to give him steady and permanent employment * * *. In consideration of the premises, the Appellee agreed to execute to the Appellant a written release * * *." Thus, the Court held that the release of an employer from a claim

for personal injury is sufficient consideration to support a contract for a permanent employee.

Plaintiff cites *H. S. Kerbaugh, Inc.* v. *Gray*, 212 F. 716, and *Carnig* v. *Carr*, 167 Mass. 544, 46 N.E. 117, neither of which is of any benefit to him. *Kerbaugh* was an action to recover a bonus offered by the employer which, being in addition to his regular wages, the Court held was a sufficient consideration. In the *Carr* case the plaintiff agreed to give up his business in addition to rendering personal services for the defendant, which the Court held was sufficient consideration to support a contract of permanent employment.

As to Count II, plaintiff states, "The sole issue raised by the Court's ruling is, whether a person, acting as an agent, can conspire with his principal to interfere with a contract to which the principal is a party." As previously noted, it is alleged that the conspiracy was between defendant, a corporation, and Dr. J. C. Fleischer, its agent, acting within the scope of his employment. Many cases hold that a corporation cannot be liable for a conspiracy with one of its own employees. See *Moig* v. *Santa Fe Transportation Co.*, 189 Kan. 419, 370 P. 2d 390; *Johnny Maddox Motor Co.* v. *Ford Motor Co.*, 202 F. Supp. 103, and *The Greyhound Corp.* v. *Commercial Casualty Co.*, 259 App. Div. 317, 19 N.Y.S. 2d 239. The reasoning is that a corporation can only act and speak through an agent, and the effect of charging a conspiracy between the two is to charge a conspiracy by a single party.

Among the cases cited by plaintiff is *Karges Furniture Co.* v. *Amalgamated Woodworkers' Local No. 131*

et al., 165 Ind. 421, 75 N.E. 877, 878, wherein the Court stated, "A conspiracy is defined to be a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means." As we have already shown, the instant contract was terminable at will. Thus, the alleged conspiracy was to do that which defendant had a legal right to do. Certainly it was not to accomplish a criminal or unlawful purpose or to accomplish such purpose by criminal or unlawful means. We conclude that Count II as a matter of law failed to state a cause of action and that defendant's motion for summary judgment was properly allowed.

Count III is based upon an alleged negligent examination and report as to plaintiff's physical condition which resulted in his discharge by defendant. Plaintiff invokes the theory of respondeat superior in support of his contention that defendant was liable for the alleged negligence of its doctor. It is true that under this doctrine the liability of an agent may be imputed to his principal; however, the question of liability and breach of duty must first be resolved. As we have already shown, defendant was free to terminate plaintiff's employment at will and owed no duty to plaintiff with regard to its continuation. Its agent, acting on its behalf, owed no greater duty to plaintiff and hence breached no duty in that respect. In any event, defendant in discharging plaintiff did nothing more than it had a right to do under the terms and conditions of his employment.

The judgment appealed from is

AFFIRMED.

APPENDIX D

COURT OF APPEALS JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.